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SUMMARY

The Bureau's partial suspension of GTE's rates for data base query service was consistent with the Commission's authority under Section 204(a) to suspend rates "in whole or in part." Contrary to GTE's contention, requirements for a "full opportunity for hearing" under Section 205 do not apply to the Bureau's action because the Bureau did not prescribe rates. In similar circumstances, in its Dark Fiber Order, the Commission found that a partial suspension of rates under Section 204(a) does not violate Section 205 even though it has the effect of temporarily establishing interim rates based upon the remaining, un-suspended portion of the charges. In that same decision, the Commission rejected arguments identical to those advanced by GTE here that the legislative history of the 1976 revisions to Section 204 suggests that the Commission's partial suspension authority was not intended to allow partial suspension of rates for new services, but only for existing services.

The Bureau's action was taken under Section 204(a). Therefore, contrary to GTE's contentions, the requirements under Section 204(b) to allow interested parties to file written comments do not apply. Section 204(a) applies where, as here, the Commission suspends rates and enters upon a formal investigation under the traditional procedures required prior to the addition of Section 204(b) in the 1976 amendments. Even assuming the Section 204(b) written comment requirement applies,

this requirement was met by way of the tariff filing and pleading cycle in which GTE has fully participated.

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JUN 14 1993

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

The Bell Operating Companies' Tariff)
for the 800 Service Management System)
Tariff F.C.C. No. 1)

and)

800 Data Base Access Tariffs)

Transmittal No. 1

CC Docket No. 93-129

To: The Commission

AD HOC TELECOMMUNICATIONS NEEDS COMMITTEE OPPOSITION TO

having their own Service Control Points ("SCPs") filed tariffs on March 1, 1993, to be effective May 1, 1993, which include charges for data base query service. Eleven parties, including the Ad

carriers to charge reasonable rates for an interim (statutory maximum 5-month) period while the rates were under investigation.^{4/}

To implement these findings and conclusions, it was necessary for the Bureau to order the carriers with rates in excess of the .0067 cents per query threshold to file tariff revisions reflecting the partial suspension of their rates on short notice so that they would be effective by the May 1, 1993, deadline for 800 number portability.^{5/} The GTOCs, whose filed rate at 1 cent per query was well above the threshold, were among the LECs whose rates were partially suspended under the Order.

GTE's Application for Review should be denied. The Bureau lawfully exercised the Commission's express authority under Section 204(a) to effect partial suspensions of the GTOCs' tariff filings, and the Order is fully consistent with the Commission's interpretation of its partial suspension authority. Indeed, virtually all of GTE's arguments are directly contrary to the Commission's disposition of identical arguments advanced in applications for review of a 1991 Bureau order which initiated an investigation of, and partially suspended, tariff revisions establishing general rates for dark fiber, an order which the Commission affirmed.^{6/}

^{4/} Order, para. 19.

^{5/} Id. at para. 32.

^{6/} Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, Memorandum Opinion and
(continued...)

II. THE BUREAU PROPERLY EXERCISED THE COMMISSION'S AUTHORITY UNDER SECTION 204(A) TO PARTIALLY SUSPEND TARIFF PROVISIONS AND SET INTERIM RATES

GTE first contends that the Order violates the requirements of Section 205 of the Communications Act, 47 C.F.R. § 205, pursuant to which the Commission may prescribe rates only after affording the filing carrier a "full opportunity for hearing."^{1/} However, in the Dark Fiber Order, the Commission found just such an application of its Section 204(a) partial suspension powers as GTOC complains of here to be proper, and rejected identical claims that the hearing provisions of Section 205 were applicable to a partial suspension, and consequent interim setting, of rates under Section 204(a).

The Bureau's tariff review procedures affirmed by the Commission in the Dark Fiber Order almost exactly parallel the procedures followed by the Bureau in the Order for which the GTOCs seek review. In the Dark Fiber case, several LECs had filed tariff revisions to establish general rates for dark fiber services. Finding "substantial reason to believe" the rates were excessive, and concluding that the tariffs raised substantial questions of lawfulness that warranted investigation, the Bureau suspended a portion of the rates and initiated an investigation of the carriers' rates and rate structures under Section 204(a). The Bureau "used estimates of the per mile cost of dark fiber for

^{5/} (...continued)

Order, FCC 91-227 (released July 19, 1991) ("Dark Fiber Order").

^{1/} Application for Review, pp. 4-6.

each carrier to determine which portion of the rates would be
suspended."²/ While all four LECs affected by the Bureau's
partial suspension order acknowledged that Section 204(a) permits

Thus, the Bureau's decision, although in effect "temporarily establishing interim rates" by partially suspending the GTOCs' tariff filing, does not, as GTE argues, contravene the hearing requirements applicable to rate prescriptions under Section 205.

Relying on excerpts from the legislative history of the 1976 revisions to Section 204, GTE next argues that the Order exceeded the Commission's authority under Section 204(a) because (1) the Commission's Section 204(a) partial suspension power does not authorize the Commission to order interim rate reductions during the suspension period and (2) the partial suspension authority was not intended by Congress to allow the Commission to set interim rates for new services, but only for existing services.^{11/} These arguments are inconsistent with the plain language of Section 204(a)^{12/} and are identical to arguments rejected by the Commission in the Dark Fiber Order:

In this case, the plain language of Section 204(a) permits suspension of a charge "in whole or in part" for five months beyond the period when it would otherwise go into effect. A fundamental principle of statutory interpretation holds that when the language of a statute is clear, an examination of legislative history is unwarranted. We therefore find that the clear language of the statute supports a partial

^{11/} Application for Review, pp. 6-9.

^{12/} Section 204(a) states in pertinent part:

Whenever there is filed with the Commission any new or revised charge, classification, regulation or practice, the Commission may . . . enter upon a hearing concerning the lawfulness thereof; and pending such hearing . . . may suspend the operation of such charge, classification, regulation or practice, in whole or in part but not for a longer period than five months beyond the time when it would otherwise go into effect⁴⁷ U.S.C. § 204(a) (emphasis added).

suspension and the establishment of interim rates during the five-month suspension period. Moreover, we believe that the legislative history of Section 204(a) and its 1976 amendments is consistent with our interpretation of the statute. Contrary to SWB's argument, we find nothing in the legislative history to indicate that the Commission's partial suspension authority is limited to existing services. Even assuming that dark fiber is not an existing service, the statute explicitly states that it applies to "new or revised" charges, and the carriers have not provided us with citations to the history that contradict our interpretation.^{13/}

Further, as noted by the Commission at paragraph 8 of its Dark Fiber Order, the courts have recognized the Commission's authority to set interim rates pending the outcome of a tariff investigation.^{14/}

GTE also disputes the validity of the Bureau's statistical analysis. GTE contends that the Order lacks the requisite "findings" to support the reasonableness of the interim rates mandated by the Order, and that the Bureau did not consider "pertinent record evidence" submitted in the GTOCs' cost study detailing cost and demand characteristics.^{15/} Contrary to GTE's unsupported assertions, the Bureau's analysis was fully sufficient to support its action, which was simply to partially suspend and set the GTOCs' rates for investigation. The GTOCs' "record evidence" will be fully considered during the course of the Commission's investigation to determine whether the rates are

^{13/} Dark Fiber Order, para. 11 (footnotes omitted) (emphasis added).

^{14/} See, New England Tel. & Tel. v. FCC, 826 F.2d 1101, 1108 (D.C. Cir. 1987); Lincoln Tel. & Tel. Co. v. FCC, 659 F.2d 1092 (D.C. Cir. 1980).

^{15/} Application for Review, p. 5.

The provisions of Section 204(a) continue to govern the traditional tariff suspension and investigation scenario which constituted the entirety of Section 204 before the addition of Section 204(b) in the 1976 amendments; that is, Section 204(a) governs where the Commission, as the Bureau did here, elects to suspend rates and initiate formal hearing proceedings. In contrast, Section 204(b) provides for "much less rigorous" procedures designed to "provide the FCC with greater, not less, flexibility in its consideration of tariff revisions" in circumstances where the Commission determines it "need not engage in hearings and need not make a formal 'just and reasonable'

as providing "two separate routes the FCC may take in dealing with carrier-initiated tariffs." Similarly, the court ultimately rejects MCI's argument that "since enactment of 204(b), no tariff revisions may go into effect temporarily . . . without a § 204(b) written showing that they are just, fair and reasonable and an opportunity for interested parties to file comments." Having elected to proceed under Section 204(a), the Bureau's actions are not subject to scrutiny under the standards governing proceedings under Section 204(b), including the Section 204(b) "written comment" requirement.

However, even assuming arguendo that the requirement for "written comment" under Section 204(b) applies to the Bureau's actions in the Order, they have been satisfied. The GTOCs have had a fully adequate opportunity to submit written comments and to otherwise participate in the tariff filing and related pleading procedures which occurred prior to adoption of the Order. Indeed, the Commission has expressly determined that the "tariff filing and petition cycle . . . provide[s] carriers and the public with an opportunity for written comment that satisfies Section 204(b) procedural requirements."^{21/}

IV. THE ORDER STRIKES A REASONED AND PROPER BALANCE BETWEEN THE INTERESTS OF THE LECS AND THEIR SUBSCRIBERS

GTE's final argument is that the Bureau could have pursued other remedies which would have protected the public interest.

^{21/} Annual 1990 Access Tariff Filings, 5 FCC Rcd. 4177, 4236 (Com. Car. Bur. 1990); recon. denied 7 FCC Rcd. 4939 (Com. Car. Bur. 1992).

In particular, GTE contends that subscribers would have been adequately protected had the Bureau allowed the rates to go into effect as filed, but subject to an accounting order that would provide for refunds in the event the Commission's investigation of the GTOCs' data dip rates finds them to be excessive.^{22/} It is understandable that the GTOCs would have preferred that their rates, although 50% higher than the threshold level determined by the Commission to be reasonable, be allowed to go into effect subject to an accounting order. However, that does not make the Bureau's determination to partially suspend the GTOCs' per query rates unlawful or even questionable as a matter of policy. The Bureau correctly concluded that the "partial suspension is reasonable and in the public interest to protect ratepayers, while allowing carriers to charge reasonable rates for an interim period."^{23/}

^{22/} Application for Review, p. 10.

^{23/} Order, para. 19.


V. CONCLUSION

For all of the foregoing reasons, the Application for Review should be denied.

Respectfully submitted,

**AD HOC TELECOMMUNICATIONS
USERS COMMITTEE**

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June 14, 1993

CERTIFICATE OF SERVICE

I, Sonia J. Arriola, a secretary in the law firm of Gardner, Carton & Douglas, certify that I have this 14th day of June, 1993, caused to be sent by first-class U.S. mail, postage-prepaid, a copy of the foregoing **AD HOC TELECOMMUNICATIONS USERS COMMITTEE OPPOSITION TO APPLICATION FOR REVIEW OF GTE** to the following:

Cheryl A. Tritt *
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